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7 GREGORY NICHOLAS STESHENKO,
8 Plaintiff,
9 v.
10 THOMAS MCKAY, et al.,
11 Defendants.
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14 Case No. [09-cv-05543-RS](#)
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**ORDER RE SPOLIATION
CONTENTIONS**

17 The parties are familiar with the history of plaintiff's claims of spoliation made in this
18 action and the prior motion practice and orders relating thereto. Those matters will not be
19 recounted here other than to note that the order denying the summary judgment motions brought
20 by the remaining defendants expressly pointed to their failure to take all appropriate steps to
21 preserve evidence as one reason that their version of the operative events could not be accepted as
22 a matter of undisputed fact. Thus, plaintiff has already been given the benefit of an evidentiary
23 inference at the summary judgment stage. The question now is whether any further measures
24 would be appropriate at trial.

25 Courts are vested with inherent powers arising out of "the control necessarily vested in
26 courts to manage their own affairs so as to achieve the orderly and expeditious disposition of
27 cases." *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir.
28 1992) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)). The Ninth Circuit has
specifically recognized trial courts have "inherent discretionary power to make appropriate

1 evidentiary rulings in response to the destruction or spoliation of relevant evidence.” *Glover v.*
2 *BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993). These inherent powers include the ability to levy
3 appropriate sanctions against a party who prejudices its opponent through the spoliation of
4 evidence. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006); *Apple Inc. v. Samsung*
5 *Electronics Co., Ltd.*, 881 F.Supp.2d 1132, 1135 (N.D.Cal. 2012) (citing *Glover*, 6 F.3d at 1329).
6 A trial court’s discretion regarding the form of a spoliation sanction is broad, and sanctions can
7 range from the minor, such as the awarding of attorney fees, to the more serious, such as
8 dismissing claims or instructing the jury that it may draw an adverse inference. *Apple*, 881
9 F.Supp.2d at 1136 (citing *Leon*, 464 F.3d at 958, 961; *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376,
10 386–87 (9th Cir. 2010)) (some citations omitted). The determination of an appropriate sanction “is
11 assessed on a case-by-case basis.” *Io Group, Inc. v. GLBT Ltd.*, 2011 WL 4974337, at *3
12 (N.D.Cal. 2011) (quoting *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001))
13 (internal citations omitted).

14 To determine whether spoliation occurred, the majority of courts use some variation of the
15 so-called *Zubulake* test. *See Apple*, 881 F.Supp.2d at 1138 (citing *Zubulake v. UBS Warburg LLC*,
16 220 F.R.D. 212, 215 (S.D.N.Y.2003) (“*Zubulake IV*”)). That test has three elements: “(1) that the
17 party having control over the evidence had an obligation to preserve it at the time it was destroyed;
18 (2) that the records were destroyed with a ‘culpable state of mind;’ and (3) that the evidence was
19 ‘relevant’ to the party’s claim or defense such that a reasonable trier of fact could find that it
20 would support that claim or defense.” *Zubulake IV*, 220 F.R.D. at 220. If spoliation is found, then
21 courts generally consider three factors to determine whether and what type of sanctions to issue:
22 “(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of
23 prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid
24 substantial unfairness to the opposing party.” *Nursing Home Pension Fund v. Oracle Corp.*, 254
25 F.R.D. 559, 563 (N.D.Cal.2008) (quoting *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79
26 (3d Cir.1994)) (courts should choose “the least onerous sanction corresponding to the willfulness
27 of the destructive act and the prejudice suffered by the victim”). After considering these factors, a
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1 court may decide to defer or decline to grant sanctions, despite a finding of spoliation. *See, e.g.*,
2 *Hamilton v. Signature Flight Support Corp.*, 2005 WL 3481423, at *8 (N.D.Cal. 2005) (finding
3 spoliation but declining to impose adverse inference sanctions because of lack of prejudice).

4 Here, the parties previously provided extensive briefing and evidentiary submissions
5 regarding the alleged spoliation. At this Court's direction, they have recently provided offers of
6 proof, in summary form, together with supporting deposition testimony excerpts. As before, the
7 record demonstrates that defendants fell short of complying with their legal obligation to take
8 reasonable steps to preserve potentially relevant evidence, specifically email that may have been
9 exchanged among College employees relating to the subject matter of this action. While
10 defendants continue to insist that all or nearly all relevant emails likely were produced
11 notwithstanding the search and retention deficiencies, it is reasonable to presume at least some
12 emails were irretrievably lost that would have been responsive to discovery requests, and that such
13 loss occurred after the duty to preserve arose, no later than October of 2009. Thus, the first
14 element of the *Zubulake* test is met.

15 Plaintiff contends emails were deliberately destroyed with the intent of concealing
16 evidence that would support the claims he is making in this action. Nothing in the record, nor any
17 reasonable inference that can be drawn from the record, supports such a claim. The Ninth Circuit,
18 however, has recognized "the power of the district court to sanction under its inherent powers not
19 only for bad faith, but also for willfulness or fault by the offending party." *Unigard*, 982 F.2d at
20 368 n.2. "A party's destruction of evidence qualifies as willful spoliation if the party has some
21 notice that the documents were potentially relevant to the litigation before they were destroyed."
22 *Leon*, 464 F.3d at 959 (internal quotation marks and citation omitted) (emphasis in original). "All
23 that the court must find is that [the spoliating party] acted with a 'conscious disregard' of its
24 obligations." *Apple*, 881 F.Supp.2d at 1147. As reflected in prior orders, the circumstances
25 surrounding the deletion of defendants McKay's email account at least arguably meets this
26 standard. Plaintiff's contentions regarding other email accounts are less compelling. While
27 defendants apparently failed to communicate effectively the need to search for, preserve, and
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1 produce potentially relevant email, the conduct does not rise to a “conscious disregard.”

2 Accordingly, while the second *Zubulake* factor arguably is present as to the McKay email, the
3 showing of any culpable state of mind is extremely weak.

4 Finally, while it is possible that at least some emails with discovery relevance were
5 destroyed, the record simply does not support a conclusion that substantial evidence supporting
6 plaintiffs’ claims, or undermining the defenses, was lost. Plaintiff’s primary theory is that
7 evidence was selectively and deliberately destroyed. If that contention were tenable, then it would
8 be reasonable to assume material emails were destroyed. The record, however, shows carelessness
9 and inadequate diligence, not targeted destruction of evidence. Under all the circumstances, it is
10 *not* reasonable to presume that any emails or other documents that may have been irretrievably
11 lost were of significant relevance. Thus, “spoliation,” if it occurred at all, was relatively minor,
12 and not prejudicial to plaintiff to the degree that further evidentiary sanctions would be warranted
13 at this juncture.

14 To be clear, defendants should not conclude from this result that their conduct met minimal
15 standards. It did not. If and when they are involved in further litigation, they must take
16 appropriate steps to ensure similar issues do not arise. In this instance, however, while the failures
17 on defendants’ part are not excusable, there is no reason to infer that plaintiff has thereby been
18 deprived of his right to a fair trial and a decision on the merits.

19 As reflected by the authorities cited above, spoliation is an issue to be determined by the
20 Court. In light of this order, defendants’ motion to exclude evidence and argument at trial
21 regarding the alleged spoliation is granted.

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23 **IT IS SO ORDERED.**

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25 Dated: December 1, 2014



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27 RICHARD SEEBORG
28 United States District Judge